No. 13889.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PREFERRED INSURANCE COMPANY, a Corporation; MICHIGAN SURETY COMPANY, a Corporation; MID-STATES INSURANCE COMPANY, a Corporation; and THE MERCANTILE INSURANCE COMPANY OF AMERICA, a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Northern District of California, Southern Division.

BRIEF OF APPELLANTS.

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BRIEF OF APPELLANTS.

Jurisdiction.

(a) *Of the District Court.* This action was filed in the District Court by appellants against appellee, United States of America, under the Federal Tort Claims Act. Under section 1346 of the Act (Title 28, U. S. C. A.), exclusive jurisdiction of such actions is vested in the District Courts.

The District Court entered a final judgment dismissing the action [Tr. 38] on the ground that the claims sued upon were not cognizable under the Act [Tr. 22-37].

(b) *Of the Court of Appeals.* Appellants have taken this appeal from the said judgment of dismissal. Juris-

diction of the appeal is vested in this Court pursuant to Title 28, U. S. C. A., Section 1291.

The Government heretofore moved to dismiss the instant appeal on the ground that it was not taken from a final judgment, and on August 31, 1953, this Court entered its order denying said motion to dismiss.

Statement of the Case.

(a) The Complaint [Tr. 3-9].

The essential allegations of the complaint are as follows: On August 5, 1950, some 17 house trailers belonging to 17 different individuals were located at Fairfield-Suisun Air Force Base (pars. V, XI[1]); on August 5, 1950, employees of defendant United States acting in the course and scope of their said employment so negligently maintained and operated a certain B-29 aircraft belonging to defendant that it crashed in the vicinity of said house trailers and the plane and its contents thereupon exploded; as a proximate result thereof, said trailers were damaged (pars. IV, VI, VII); plaintiffs were insurance companies and insured said trailers against explosion damage (pars. VIII, XI); plaintiffs paid to the respective owners of said trailers, the full amount of loss thereto, the total loss payments being in the sum of $49,661.00 (pars. IX, XI); by virtue of said payments, plaintiffs became subrogated to the rights of their respective insureds against defendant for recovery of said damage (par. X).

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[1]The paragraph number (XI) is inadvertently omitted from the Transcript of Record. Paragraph XI will be found at page 7 of the Transcript.

(b) The Motion to Dismiss [Tr. 10-11].

Defendant moved to dismiss the complaint on the ground that there was no jurisdiction of the subject matter because the trailers belonged to Air Force personnel on active duty, and claims for their negligent destruction were not cognizable under the Tort Claims Act.

(c) The Stipulation of Facts [Tr. 13-17].

For the purpose of the motion, plaintiffs and defendant entered into a stipulation of facts,[2] of which the following are the material portions:

(1) The owners of the trailers were enlisted men and officers of the United States Air Force assigned to Fairfield-Suisun Air Force Base, and they lived in the trailers with their families [Tr. 15-16].

(2) Each of the trailers was the private property[3] of the soldier concerned, and the Government had no interest therein [Tr. 16].

(3) The personnel were entirely free to live off the Base [Tr. 15].

(4) There were not sufficient public quarters on the Base to house the personnel assigned to the Base, and the surrounding area was a critical housing area [Tr. 15].

(5) For the convenience and accommodation of the personnel and their families, the Government established a Trailer Park on the Base [Tr. 13-16].

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[2]The same stipulation was also signed by counsel for the plaintiffs in seven other cases which cases were also decided by the same opinion of the District Judge as decided the instant case. We are advised that the plaintiffs in those cases have also appealed to this Court from the ruling of the District Judge.

[3]All of the personnel were married and the trailers were actually the community property of the soldier and his wife [Tr. 16].

(6) The use and occupation of the Trailer Park was not required in the operation of the Base [Tr. 16].

(7) No one was required to use the Trailer Park, and personnel who desired to do so made voluntary application at their sole discretion for permission to park their trailers therein [Tr. 16].

(8) The personnel who used the park were required to pay rental to the Government for the space assigned and also to pay for the utilities furnished [Tr. 14-16].

(9) Personnel occupying the park were entitled to and drew the regular quarters allowance allowed to personnel not furnished government quarters and who lived off the Base [Tr. 15].

(10) Personnel occupying the park were free to leave the Base on the same basis as all other personnel [Tr. 14].

(11) The house trailers involved in the suit were located in the Trailer Park at the time of the plane crash [Tr. 13].

(12) The plane that crashed had taken off from the Base a short time before it crashed [Tr. 17].

(13) The owners of the trailers had no duties whatsoever with respect to the maintenance, servicing, loading, operation, dispatch or control of said plane [Tr. 16].

(14) At the time of the crash, the owners of the trailers were off duty in neighboring communities [Tr. 16].[4]

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[4]The stipulation states that the personnel were on and off duty on and off the Base, some of them even being located overseas. Since the District Court disposed of the case on a motion to dismiss on a basis of lack of jurisdiction, appellants believe they are entitled to take the statement of facts in the light most favorable to them, where different fact situations are provided for in the stipulation, as here.

(15) The trailers were fully insured, and the insureds had no uninsured losses with respect thereto [Tr. 7]; however, the insureds and their families sustained other uninsured personal property losses as a result of the crash; as to these latter articles, they submitted claims to the Government under the Military Personnel Claims Act of 1945,[5] which were paid in part[6] [Tr. 15, 18-20].

(16) The claim forms filed by the soldiers with the Government set forth that the house trailers were fully insured (by a named insurer), and that the insurer had paid the full loss thereon to the soldier; and no claim was made therefor by the soldier and nothing paid with respect thereto by the Government [Tr. 15-18].

(d) The Opinion of the District Judge [Tr. 22-37].

The District Judge concluded that the claims for loss to these trailers were not cognizable under the Tort Claims Act for the following reasons:

(1) In *Feres v. United States,* 340 U. S. 135, 71 S. Ct. 153, 95 L. Ed. 152, the Supreme Court held that

> "suits by servicemen for (personal) injuries which 'arise out of or are in the course of activity incident

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[5]59 Stat. 225, 31 U. S. C. A. 222(c).

[6]As will be noted in more detail hereinafter, said Act "authorizes" (but does not require) the Secretary of Defense to pay military and civilian personnel of the Defense Department for such personal property losses incident to their service as he "may by regulation prescribe," where the property is "determined to be reasonable, useful, necessary or proper under the attendant circumstances." The Act and the Regulations adopted pursuant thereto contain numerous exclusions and restrictions with respect to the type and amount of loss for which the Government will pay, even though the loss is "incident to service." This no doubt explains why the sample claim in the record [Tr. 18-20] was only allowed for 50% of the uninsured claim, and the insured portion entirely disallowed.

to service' are not maintainable under the Federal Tort Claims Act"[7] [Tr. 23].

(2) The rule of the *Feres* case as to service connected personal injury claims "should apply to suits by servicemen for property losses"[8] [Tr. 24].

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[7]In *Brooks v. United States,* 337 U. S. 49, 69 S. Ct. 918, 93 L. Ed. 1200, where a soldier, while on furlough, was injured by a negligently driven Army truck, the Supreme Court upheld his right to sue the Government for damages under the Tort Claims Act. This decision was approved in the *Feres* case on the ground that the injury to Brooks "did not arise out of or in the course of military duty" and because "Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders."

[8]In making this statement, the District Judge noted [Tr. 24] that "all the parties agree, and so does the court," that the personal injury rule of the *Feres* case should apply to service connected property losses. Appellants do not agree, in fact emphatically disagree for reasons which will be hereinafter pointed out in detail, that the rule of the *Feres* case is applicable to service connected property losses. It will be shown that for the past 40 years, both Congress and the Executive Department have provided and recognized that service connected property losses of military personnel were cognizable and payable under all claims statutes, including the Tort Claims Act, the same as property losses of civilians, and were not restricted to the Military Personnel Claims Act of 1945 and its predecessors.

In Memo of points and authorities in the District Court (p. 3), appellants at one point conceded (for the purpose of argument only), that the rule of the *Feres* case might be applied to service connected property losses, and then argued that these losses were not service connected; but on pages 8 and 9 of this same Memo, appellants argued that the fact that the Military Personnel Claims Act may have also covered these claims, "does not preclude coverage of the same claim by the Tort Claims Act" and that the Military Personnel Claims Act "cannot operate to bar the claims here in suit."

The District Judge reached his decision in this case as a result of his own reasoning and research, and not because of reliance upon any statement in appellants' Memo. There was no stipulation in the District Court with respect to the matter in question. The Government moved to dismiss the complaint because of an alleged lack of jurisdiction. The District Judge decided the question purely as a question of law. If the decision was incorrect as to this issue, appellants are entitled to urge such error on this appeal.

(3) The Military Personnel Claims Act of 1945 was intended as and is the sole and exclusive remedy of service personnel for property damage losses incident to their service. Said the District Judge:

> "The Military Personnel Claims Act of 1945 (cit.) was passed for the expressed purpose of providing a *'single'* statute for the settlement of *claims of military personnel* for the loss of their personal property incurred while in the service." [Tr. 26.]
>
> "It was manifestly the intent of the Congress that the Military Personnel Claims Act should remain as the *single* comprehensive remedy for property losses of *military personnel* incident to their service.
>
> "Since property losses *of military personnel* incident to their service are *compensable exclusively* under the Military Personnel Claims Act * * *"[9] [Tr. 29].

(4) The sole test in determining whether property damage losses are service connected within the rule of the *Feres* case and so excluded from coverage under the Tort Claims Act is whether they are "incident to service" under the Military Personnel Claims Act.

> "Since property losses of military personnel incident to their service are compensable exclusively

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[9]In spite of the broad language of the District Judge that said Act was the *"single remedy" of service personnel for property damage claims incident to service,* and without noting any apparent inconsistency therewith, the District Judge found it unnecessary "to determine whether military personnel may sue under the Tort Claims Act for property losses (incident to their service), which, by regulation, are not reimbursable under the Military Personnel Claims Act" [Tr. 36], or "to determine whether suits may now be brought under the Tort Claims Act upon claims exceeding the $2500 maximum prescribed for compensable claims by the 1952 amendment" to said Act [Tr. 29].

under the Military Personnel Claims Act, that Act must be the guide in determining what losses are 'incident to service' " [Tr. 29].

(5) The term "incident to service" as used in the Military Personnel Claims Act

> "was not employed * * * in any restricted sense to require that a compensable loss occur during the performance of military duties or on a military base. The term was used in a general sense merely to indicate that the loss must bear some substantial relation to the claimant's military service" [Tr. 34].

(6) The losses to the trailers were incident to the service of the owners under the Military Personnel Claims Act [Tr. 34].

(7) The losses were not within the exclusion in said Act of losses occurring "at quarters occupied by the claimant * * * which are not assigned to him or otherwise provided in kind by the Government" (31 U. S. C. A., Sec. 222(c)) [Tr. 35-36], because *the piece of ground* upon which the soldier parked his trailer and for which he paid a rental, constituted *"assigned quarters"* and the occupancy by him of government *"quarters"* [Tr. 35-36].

(8) These claims were not cognizable under the Military Personnel Claims Act since the Regulations thereunder exclude claims which are "recoverable from an insurer" [Tr. 37] (and see 32 C. F. R. 836.93(j)).

(9) Nor are these claims cognizable under the Tort Claims Act, *since if they had been uninsured,* they would have been compensable under the Military Personnel Claims Act[10] [Tr. 36], which is *the single, exclusive remedy of personnel* for property losses incident to service [Tr. 26-29].

(10) This leaves appellants without any court or administrative remedy.

> "If plaintiffs feel themselves aggrieved, * * * their recourse must be to the Congress. Suits against the Government by insurers[11] to recover for the service-connected property losses of military personnel, are not authorized * * *" [Tr. 37].

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[10]Actually there is no way of telling if the losses to the trailers, if uninsured, would have been recoverable under the Military Personnel Claims Act, and if so, to what extent; 32 C. F. R. 836.93(g) excludes claims for damage to motor vehicles, except in the case of public disasters (such as was the case here), in which event the "claim may be recommended to the approving authority *for consideration.*" Bearing this in mind, and the further discretion contained in 32 C. F. R. 836.94 as to the amount to be allowed as to any claim, depending on "the circumstances," and the variation in value of these trailers from a low of $1,600 to a high of $4,500, it is clear that no one can state what disposition would have been made of these trailer claims, if they were uninsured.

[11]While the District Judge attempted to restrict the scope of his decision to the insurance exclusion contained in the Regulations, he failed to point out why the decision is not equally applicable to the many other claims excluded or restricted under the Regulations. As heretofore noted (footnote 9, *supra*), the District Judge found it "unnecessary" to determine this latter question. As will be pointed out hereinafter, if the decision is correct, it will also apply to all such excluded and restricted claims, and hence the ruling is of importance not only to insurers but to the millions of military and civilian personnel of the Defense Department.

Specification of Errors and Questions Involved.

The District Court erred in the following respects:

(1) In holding: that the Military Personnel Claims Act is the sole remedy of military personnel for service connected property damage losses; that the service connected personal injury rule of the *Feres* case is applicable to service connected property damage losses; that such property damage losses are not cognizable under the Tort Claims Act.

(2) In holding: that property damage claims incident to service that are excluded from coverage under the Military Personnel Claims Act are nevertheless not cognizable under the Tort Claims Act, thus leaving the claimant without any remedy; that these claims were not within the "quarters" exclusion of the Military Personnel Claims Act.

(3) In holding that these losses were service connected within the rule of the *Feres* case.

ARGUMENT.

I.

The Legislative and Administrative History of the Military Personnel Claims Act and the Tort Claims Act Compels the Conclusion That Negligently Caused Service Connected Property Damage Claims Are Cognizable Under the Tort Claims Act.

(a) The District Judge's Analysis of the Military Personnel Claims Act Was Erroneous.

The District Judge noted that the Military Personnel Claims Act of 1945 was one part of a tripartite congressional plan to consolidate into three statutes, all claims incident to activities of the War Department. The first part was the Foreign Claims Act of 1943 (57 Stat. 66, 31 U. S. C. A., sec. 224(d)), which covered claims of inhabitants of foreign countries damaged by activities of the Army in such countries. The second was the Military Claims Act of 1943 (57 Stat. 372), which (when enacted) covered claims incident to noncombat activities of the Army, *but excluded personal injury and property damage claims of military personnel incident to service.* The third was the Military Personnel Claims Act of 1945 passed by the 79th Congress, and which covered property damage claims of military personnel incident to service. In 1946, this same Congress passed the Tort Claims Act, which specifically repealed *pro tanto* so much of the Military Claims Act of 1943 (and various other claim statutes) as covered negligence claims and put *all of such negligence claims* under the Tort Claims

Act. The District Judge concluded from this, and from the mention of the 1943 Military Claims Act and the failure to mention the 1945 Military Personnel Claims Act in the Tort Claims Act, that:

> *"it was manifestly the intent of the Congress that the Military Personnel Claims Act should remain as the single comprehensive remedy for property losses of military personnel incident to their service."* [Tr. 26-29].

It is respectfully submitted that in so analyzing these statutes and in reaching the above conclusion, the learned District Judge fell into an error that completely destroyed the premise upon which the above conclusion is based. *When enacted in 1943,* the Military Claims Act did exclude personal injury and property damage claims of military personnel incident to service. *But by section 4 (hereinafter referred to in detail) of the Military Personnel Claims Act of 1945, the 79th Congress specifically repealed so much of the Military Claims Act of 1943 as excluded property damage claims of military personnel as were incident to service, and thereafter such claims were included under the Military Claims Act as well as under the Military Personnel Claims Act. And when the Tort Claims Act was enacted by the same 79th Congress, and it transferred to the Tort Claims Act all negligence claims then cognizable under the Military Claims Act (and other claim statutes), it thereby included therein negligently caused property damage claims of military personnel incident to their service.* That it was the deliberate and carefully considered intention of Congress and the Defense Department that property damage claims of service personnel incident to their service were to be cognizable under all applicable claims

statutes including the Tort Claims Act, and were not to be restricted to the Military Personnel Claims Act appears beyond any question upon a consideration of the legislative and administrative history and construction of the various claims statutes, starting with the Military Personnel Claims Act of 1885 up to and including the Tort Claims Act of 1946. We set forth such a history herewith.

(b) The Various Claim Statutes; Their Scope and Construction.

(1) The Military Personnel Claims Act of March 3, 1885 (23 Stat. 350).

This was the first military personnel claims act and was quite restricted in scope. It provided for the Treasury Department to determine the value of private property of military personnel "lost or destroyed in the military service" under certain restricted circumstances. It further provided that liability under the Act

> "shall be limited to such articles of personal property as the Secretary of War, in his discretion shall decide to be reasonable, useful, necessary, and proper for such officer or soldier while in quarters, engaged in the public service, in the line of duty."

(2) The "Gunfire Act" of August 24, 1912 (37 Stat. 586).

This was the first general claims act covering property damage claims incident to noncombat activities of the army. It provided as follows:

> "*Provided,* that hereafter the Secretary of War is authorized to consider, ascertain, adjust, and determine the amounts due on *all claims* for damages

> to and loss of private property when the amount of the claim does not exceed the sum of one thousand dollars, occasioned by heavy gun fire and target practice of troops, and for damages to * * * private property, found to be due to maneuvers or other military operations for which the Government is responsible, and report the amounts so ascertained and determined to be due the claimants to Congress at each session thereof through the Treasury Department for payment as legal claims out of appropriations that may be made by Congress therefor."

It will be noted that the Act covered *"all claims* for damages to and loss of private property," but did not specifically mention property damage claims of military personnel incident to service. In *Digest of Opinions, Judge Advocate General of the Army,* 1912-1940, Sec. 709, page 449 (Opinion No. 18-463, 8/31/14), it appeared that an army officer occupied government quarters at West Point, and that heavy artillery practice caused a china closet in his quarters to fall, thus breaking his china and glassware valued at $620. The loss was held to be "in the service" under the 1885 Act, but within one of the exclusions thereof, since the articles were of an expensive nature. The Judge Advocate General ruled that the claim was, however, covered under the Gunfire Act of 1912, *supra*:

> *"Held,* That from the unusually expensive character of the articles destroyed, they could not be considered such as the Secretary of War should determine to be reasonable, useful, and necessary for the officer in service while in quarters, within the meaning of the act of March 3, 1885 (23 Stat. 350) but that the claim might be adjusted and re-

ported to Congress for appropriation[12] under the provisions of the act of August 24, 1912 (37 Stat. 586), as a loss of private property not exceeding $1,000 in value occasioned by heavy gunfire and target practice of troops, *the act applying to losses of private property of officers residing upon military reservations as well as to losses of the property of civilians.*"

(3) The Military Personnel Claims Act of July 9, 1918 (40 Stat. 880).

This Act amended and somewhat broadened the 1885 Act, but the specific amendments are not pertinent to the issues here.

(4) The Military Personnel Claims Act of March 4, 1921 (41 Stat. 1436).

This Act further amended and broadened the 1885 and 1918 Acts. As did its predecessors, it contained many exclusions and restrictions, and the allowance and amount of allowance of any particular claim was within the discretion of the Secretary of War.

(5) The Small Tort Claims Act of December 28, 1922 (42 Stat. 1066).

This was the first general negligence (tort) claims act passed by Congress. It covered "any claim" for negligent damage to "privately owned property" up to

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[12]Since the opinion was written in 1914 and the Digest was not published until 1940, it may be assumed that over the years Congress appropriated the money for payment of this and similar claims.

$1000.[13] Claims allowed by the department head were certified to Congress for payment. Again, it made no specific mention of claims of military personnel. The pertinent portions of this Act were as follows:

> "Sec. 2. That authority is hereby conferred upon the head of each department * * * of the United States to consider, ascertain, adjust, and determine *any claim* * * * on account of damages to or loss of privately owned property where the amount of the claim does not exceed $1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment. Such amount as may be found to be due to any claimant shall be certified to Congress as a legal claim for payment out of appropriations that may be made by Congress therefor * * *."

The Judge Advocate General of the Army construed this Act as including negligently caused property damage losses of military personnel incident to their service. And since Congress had to appropriate the funds to pay claims under this Act, it is apparent that Congress concurred in such construction. For example, see the following Judge Advocate General's opinions:

> "Property of Army personnel.—If the loss of private property of an officer while in storage is due to the negligence of any officer or enlisted man, though not payable under the act of March 4, 1921 (41 Stat. 1436), under the Comptroller's rulings, the amount may be certified to Congress under the act of December 28, 1922 (42 Stat. 1066)." 332.32, May 21, 1926, *Dig. of Ops. JAG Army,* 1912-40, p. 456, Sec. 713.

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[13]Claims over $1,000 could only be allowed by obtaining passage of a special bill by Congress.

"Claim for loss of baggage. Claimant, an Army officer, was ordered from a station in the continental United States to one in the Canal Zone. After the effective date of his orders and after his compliance with them the baggage in question was purchased by third parties as a wedding present for claimant and shipped to him by Army transport. It was lost in transit. Claim disallowed. Held: Baggage purchased after the effective date of change of station orders may not be included in the authorized change of station allowance of baggage and its loss in transit is not reimbursable under the act of Mar. 4, 1921, as implemented by AR 35-7100. However, if such a loss is due to the negligence of Government employees, relief may be had under the act of Dec. 28, 1922, as implemented by AR 35-7070." SPJGD, 1942/5773, Nov. 25, 1942, 1 *Bull. JAG Army*[14] 331.

That these claims were incident to service within the meaning of the Military Personnel Claims Act but were not payable thereunder only because of exclusions or restrictions in that Act is implicit in the above opinions, and from Footnote 6 of the opinion of the District Judge herein [Tr. 33].

(6) The Military Claims Act of July 3, 1943 (57 Stat. 372).

This Act was intended to include claims for personal injury or property damage (negligent or non-negligent) arising out of noncombat activities of the War Department, not exceeding $500.00 in amount. The Act pro-

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[14]The reference is to the Bulletins, Judge Advocate General of the Army.

vided for claims over that amount to be reported by the Secretary of War to Congress for its consideration. Its pertinent provisions were as follows:

> "* * * the Secretary of War, * * * (is) hereby authorized to consider, ascertain, adjust, determine, settle and pay in an amount not in excess of $500, * * * *any claim* against the United States * * * for damage to or loss or destruction of property, real or personal, or for personal injury or death, caused by military personnel * * * while acting within the scope of their employment, or otherwise incident to noncombat activities of the War Department or of the Army * * *.
>
> "* * *. The Secretary of War may report such claims as exceed $500 * * * to Congress for its consideration."

This Act (sec. 1) specifically excluded from its coverage

> "claims for damage to or loss or destruction of property of military personnel or civilian employees of the War Department or of the Army, or for personal injury or death of such persons, if such damage, loss, destruction, injury or death occurs incident to their service."

Since this Act covered both negligence and non-negligence claims against the Army, it provided (in Sec. 4) that the Small Tort Claims Act of 1922, *supra,* "shall hereafter be inapplicable to the War Department," and that the Gunfire Act of 1912, *supra,* be repealed.

It further provided (in Sec. 6) that the Military Personnel Claims Act of 1921, *supra,* be amended to include within its coverage civilian employees of the War Department.

In 1945 (59 Stat. 662), the provisions of this Act (Military Claims Act of 1943) were extended to cover the Navy Department; and in 1946 (60 Stat. 332), the claim limitation was raised from $500.00 to $1,000.00.

Thereafter (until 1945), property damage claims of military personnel incident to service, but not covered under the Military Personnel Claims Act because of the exclusions and restrictions therein or in the Regulations thereunder, were not recoverable under the Military Claims Act of 1943 because of the specific exclusion of such claims therein; nor were they recoverable under the Small Tort Claims Act of 1922, because (since 1943) that Act was no longer applicable to the War Department. The following Judge Advocate General's opinion is illustrative of the rulings on such claims during this (1943-1945) period:

> "Claim by an officer for value of damaged clothing. When claimant reported to the hospital with a skin disease, the medical officer ordered that his clothes be placed in an autoclave and disinfected. The clothing was rendered unserviceable. Claim disapproved. Held: The claim does not come within the scope of the act, 4 March 1921, as amended; and since the damage occurred incident to claimant's service, it is barred from payment under sec. 1, act of 3 July, 1943." SPJGD 1943/D-1932, 19 February, 1944, 3 *Bull. JAG* 67.

(7) The Military Personnel Claims Act of May 29, 1945[15] (59 Stat. 225).

This Act did two major things. *First,* it repealed the 1921 Military Personnel Claims Act and enacted a somewhat broader Military Personnel Claims Act. Its basic provisions were as follows:

> "The Secretary of War, * * * (is) hereby authorized to consider, ascertain, adjust, determine, settle, and pay any claim against the United States, * * * of military personnel and civilian employees of the War Department or of the Army, when such claim is substantiated, and the property determined to be reasonable, useful, necessary, or proper under the attendant circumstances, in such manner as the Secretary of War may by regulation prescribe, for damages to or loss, destruction, capture, or abandonment of personal property occurring incident to their service, or to replace such personal property in kind; *Provided,* That the damage * * * shall not have occurred at quarters occupied by the claimant * * * which are not assigned to him or otherwise provided in kind by the Government."

While this 1945 Act was broader than the 1921 Act, it still reposed complete discretion in the Secretary of War (now Defense Department) to reject or reduce any claim. And this Act and the Regulations adopted thereunder contained many exclusions and restrictions as to the type and amount of claims allowable and payable thereunder, although incident to service. The Act itself

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[15]This is referred to by the District Judge as the third statute in the tripartite plan for handling all claims incident to activities of the War Department [Tr. 27-29]. The first step was the Foreign Claims Act (57 Stat. 66), *supra,* which is not pertinent here. The second step was the Military Claims Act of 1943, *supra.*

excluded losses occurring at quarters not assigned by the Government, and loss of property not "determined to be reasonable, useful, necessary or proper under the attendant circumstances." And the Regulations adopted by the Secretary of Defense excluded recovery for loss of jewelry, money (except limited amounts deposited for safekeeping), expensive articles, unnecessary property, motor vehicle damage (except in certain limited instances which may be presented for "consideration"), transportation and baggage losses not conforming to government requirements as to weight, etc., losses "which have been recovered or are recoverable from an insurer," etc. (32 C. F. R. 836.92-836.95, incl.); and since 1952, there is an overall limitation on any claim of $2,500.00 (66 Stat. 321).

The *second* major change made by the Military Personnel Claims Act of 1945 was in Section 4 thereof,[16] *which amended the Military Claims Act of 1943 by deleting the exclusion from coverage under the latter act of property damage (but not personal injury) claims of military and civilian employees of the War Department, incident to their service. Thereafter, such property dam-*

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[16]Said Section 4 of the Military Personnel Claims Act of 1945 provided as follows:

> "Sec. 4. That portion of section 1 of the Act of July 3, 1943 (cit.), reading as follows: 'The provisions of this Act shall not be applicable * * * to claims for damage to or loss or destruction of property of military personnel or civilian employees of the War Department or of the Army, or for personal injury or death of such persons, if such damage, loss, destruction, injury, or death occurs incident to their service' is hereby amended * * * to read as follows: 'The provisions of this Act shall not be applicable * * * to claims for personal injury or death of military personnel or civilian employees of the War Department or of the Army if such injury or death occurs incident to their service.'"

age claims were cognizable under the Military Claims Act of 1943 as well as the Military Personnel Claims Act of 1945.

The opinion of the District Judge completely overlooked this portion of the Military Personnel Claims Act. In characterizing this Act as a "*single* comprehensive system for the reimbursement of military personnel and civilian employees of the War Department for all property losses incident to their service" [Tr. 27], the District Judge was no doubt misled by general language along those lines in House Report No. 237, 1945 Congressional Code Service 715, and in letters from the Secretary of War and the Judge Advocate General of the Army attached thereto, concerning the *proposed* Military Personnel Claims Act, and referred to by the District Judge in his opinion [Tr. 26].

A reading of said House Report and letters shows that the writers were concerned because military personnel (since 1943) no longer had coverage for negligent acts of the Army that damaged their property incident to service, under the Small Tort Claims Act of 1922, *supra,* or under the Military Claims Act of 1943, *supra,* and that it was their intent and desire to restore such rights to military personnel, as well as give them broader coverage under the proposed Military Personnel Claims Act of 1945. The following which is contained in both Secretary Patterson's letter of 2/2/45 to the Speaker of the House and the letter of the Judge Advocate General attached thereto makes this clear:

> "Perhaps the greatest injustice is being done to those persons who lose their clothes and personal effects in barracks fires. The second category of section 1, act of March 4, 1921, is very limited in

its scope. When a fire breaks out in barracks at night and a soldier is awakened in time to do nothing more than escape from the building and save his own life his claim cannot be paid * * * *even if the fire was caused by the negligence of Government personnel;* their claims are not payable because they do not come within purview of the act of March 4, 1921, as heretofore construed, *nor are such claims payable under the act of July 3, 1943, because the loss occurred incident to their service and such claims cannot now be paid under the act of December 28, 1922, because it is no longer applicable to the War Department."*

This is further made clear by the following statement found in both of said letters:

"The purpose of the proposed legislation is to accomplish the following:

* * * * * * * *

"3. *To authorize the payment of certain types of meritorious claims formerly payable under the act of December 28, 1922* (42 Stat. 1066; 31 U. S. C. 215-217), *but not now payable due to the fact that the above statute is no longer applicable to the War Department and the claims in question are specifically excluded from the provisions of the act of July 3, 1943,* and are not within the limited scope of the act of March 4, 1921, as amended."

Pursuant to the foregoing, Section 4 of the Military Personnel Claims Act (quoted above) was included in that Act *thereby making available to military and civilian personnel of the War Department the Military Claims Act of 1943 with respect to negligent and non-negligent property damage claims incident to service,* thus restoring to them the rights they had previously had under the

Small Tort Claims Act of 1922 and the Gunfire Act of 1912. *In short, in passing the Military Personnel Claims Act of 1945 Congress intended and provided that military personnel should have all the rights then accorded to civilians, for property damage losses incident to their service, as well as the additional rights provided by the Military Personnel Claims Act.*

That the foregoing analysis is correct appears from the following opinion of the Judge Advocate General of the Army (who, as noted above, was instrumental in the enactment (if he did not draft) the Military Personnel Claims Act of 1945):

> "Hereafter follow the first decisions under the new regulations (A. R. 25-100, 29 May, 1945), interpreting the act of 29 May, 1945. Any decision on claims of military personnel or civilian employees which has heretofore appeared in the Digests or Bulletins should be carefully examined as to its applicability under the new statute and regulations before it may safely be regarded as authoritative. SPJGD/D-39091, 31 July, 1945.
>
> "Scope.—Claim for damage to automobile. Claimant, an Army officer, while traveling in his automobile pursuant to temporary duty orders, suffered property damage as the result of the negligence of an Army truck driver acting within the scope of his employment. The claim had been disapproved for the sole reason that *the damage occurred incident to claimant's service,* and, therefore, could not be favorably considered under the provisions of the act of 3 July, 1943 (57 Stat. 372). The claim was considered under the provisions of the act of 3 July, 1943, as amended by sec. 4 of the Military Personnel Claims Act of 1945 (approved 29 May,

1945), and was allowed. *Held: The Military Personnel Claims Act of 1945 has repealed the prohibition contained in the act of 3 July, 1943 against the payment of claims of military personnel and civilian employees of the War Department or the Army for damage to or loss or destruction of property occurring incident to their service* * * *. The claim, being in all other respects within the provisions of the act of 3 July, 1943, is now payable." SPJGD/D-36478, 31 July, 1945, 4 *Bull. JAG* 287.

Another Judge Advocate General ruling of interest involved a situation where a soldier in an Army hospital deposited $321.20 with the hospital authorities for safekeeping. The money was not returned to him. The loss was held incident to his service under the Military Personnel Claims Act but the Army Regulations under that Act limited his recovery to $100.00. Held, he could claim and collect the full amount of his loss under the Military Claims Act of 1943:

"Secs. 1, 2, act of 3 July, 1943 (57 Stat. 372); Sec. 4, act of 29 May, 1945 (Pub. Law 67, 79th Cong. 59 Stat. 225); 31 U. S. C. 223b, 223c.

"Scope of act.—Claim for loss of property delivered to an Army hospital. Claimant deposited with proper military authorities in the hospital French francs worth $321.20 * * *. He was given a receipt, but the property was never returned to him * * *. The claim was filed under AR 25-100 (Military Personnel Claims Act), but was considered under the provisions of AR 25-25 (Military Claims Act), since, in the absence of special circumstances not shown in this case, money claims under AR 25-100 will be limited to $100 or one month's pay, whichever is greater. Claim approved for $321.20. Held:

> The delivery of the French francs to authorized military personnel constituted a bailment to the Government. The claim is therefore payable without regard as to the cause of the loss. The limitation of $100 or one month's pay as applied to claims under AR 25-100 is not controlling in claims settled under AR 25-25. * * *." SPJGD/D-186805, 2 February, 1946; SPJGD/D-202385, 4 April, 1946, 5 *Bull. JAG* 68.

These rulings are illustrative of a uniform line of decisions by the Judge Advocates General of the armed services since the Military Personnel Claims Act of 1945 holding that military and civilian personnel of the services are not restricted to the Military Personnel Claims Act for property damage losses incident to their service, but have available to them the additional claims provisions applicable to civilians generally. And since Congress has appropriated the funds with which such claims have been paid over the years, it must be deemed to have approved of such construction of unambiguous language contained in its own statute.

(8) The Federal Tort Claims Act of 1946. (60 Stat. 842).[17]

In 1946 the same (79th) Congress that passed the Military Personnel Claims Act of 1945, passed the Federal Tort Claims Act. Section 921 of the Act provided

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[17]The Federal Tort Claims Act was originally enacted by the 79th Congress as Title IV of the Legislative Reorganization Act of 1946 (60 Stat. 842, Chap. 753, Tit. IV, Public Law 601). Those portions of the Act that were codified became Title 28, U. S. C. A., Sections 921 *et seq.* In 1948 (62 Stat. 982) and 1949 (63 Stat. 106) the codified sections were revised and became Title 28, U. S. C. A., Sections 1346, 2671-2680; but no substantive changes were made and we need not be concerned therewith.

for administrative settlement of claims not exceeding $1,000.00:

> "Sec. 921. * * * authority is hereby conferred upon the head of each Federal agency, * * * to consider, ascertain, adjust, determine, and settle *any claim* against the United States for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death, where the total amount of the claim does not exceed $1,000, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable * * * in accordance with the law of the place where the act * * * occurred."

Section 931 of the Act provided that suit may be brought against the Government in the District Court on all claims whether for more or less than $1,000.00:

> "Sec. 931. * * * the United States district court * * * shall have exclusive jurisdiction to hear, determine, and render judgment *on any claim* against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his * * * employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. * * * the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to

> the same extent as a private individual under like circumstances. * * *"

As noted by the District Judge [Tr. 28] "Sec. 424[18] of the Tort Claims Act repealed all previous statutes which authorized the administrative adjustment of claims for property losses due to the negligence of government employees, if such claims were cognizable under the Tort Claims Act. The Military Claims Act of 1943 * * * was one of the statutes specifically repealed *pro tanto.*" Said section also specifically repealed the Small Tort Claims Act of 1922. Section 424 further provided that said statutes remained in force to the extent not covered by the *pro tanto* repeal. In other words, the net effect was that the Military Claims Act of 1943 remained in force only as to non-negligence claims, and negligence claims previously cognizable thereunder were transferred to the Tort Claims Act. On the other hand, the Small Tort Claims Act was completely repealed by Section 424, since it only covered negligence claims, and all claims theretofore cognizable under it were transferred to the Tort Claims Act.

One of the purposes of the Tort Claims Act was to remove from Congress the burden of entertaining private claim bills and Section 131[19] of the Act provided that:

> "No private bill * * * authorizing or directing (1) the payment of money for property damages * * * for which suit may be instituted under the * * * Act * * * shall be received or considered in either the Senate or the House of Representatives."

[18, 19]The reference is to Public Law 601, as this section of the Act has never been codified.

The Act (Sec. 943) contained 12 categories of excepted claims but none of them are relevant to the issues herein.

Bearing in mind that at the time the Tort Claims Act was enacted, property damage claims of military personnel incident to service were covered under the Military Claims Act (both administratively and as to the Congressional bill provision thereof), and also under the Military Personnel Claims Act; that such double coverage had been specifically and intentionally provided for by the same Congress that passed the Tort Claims Act for the specific purpose of broadening the claim rights of military personnel for loss of property incident to service; that the Military Claims Act of 1943 and the Tort Claims Act contain almost identical language as to claims covered, to wit, "*any claim* against the United States * * * for damage to or loss or destruction of property * * *" (Military Claims Act); "*any claim* against the United States for money only * * * on account of damage to or loss of property * * *" (Tort Claims Act); the *pro tanto* repeal as to negligence claims cognizable under the Military Claims Act and the transfer of such claims to the Tort Claims Act; and the Congressional intent thereby to eliminate presentation of tort claims by Congressional bill; it is submitted that the only reasonable conclusion is that in enacting the Tort Claims Act Congress intended to include thereunder property damage claims of military personnel incident to their service. For a case construing the Military Claims Act of 1943 and the Tort Claims Act and reaching that precise conclusion in an analogous situation, see *Samson v. United States* (S. D., N. Y.), 79 Fed. Supp. 406, discussed in detail, Point I, (c), *infra.*

The claims sued upon here arose out of noncombat activities of the Air Force and after passage of the Military Personnel Claims Act of 1945, they were cognizable under the Military Claims Act. And since they are based on negligence, upon passage of the Tort Claims Act, they became cognizable under that Act.

The processing by the Defense Department since passage of the Tort Claims Act of negligently caused property damage claims of service personnel incident to their service under the Tort Claims Act confirms the construction here urged by appellants. And since Congress has appropriated the money used by the Defense Department to pay such claims, it must be deemed to have approved thereof. The following Judge Advocates General opinions illustrate the foregoing.

The Judge Advocate General of the Air Force has ruled that where money is lost by a soldier *incident to his service,* claim may be made therefor under the Tort Claims Act (Air Force Reg. 112-4) (negligence), Military Claims Act of 1943 (Air Force Reg. 112-3) (non-negligence), or the Military Personel Claims Act (Air Force Reg. 112-7):

> "Although par. 3(b)(5), AFR 112-7, provides for reimbursement for currency only in specific and limited circumstances, in proper cases such claims may be approved under any of the categories enumerated in par. 3 of this regulation, except when a determination is made that they are barred by par. 5a, or involve transportation losses (par. 3b (2)). money lost (stolen) while traveling under orders is not considered reimbursable in view of EO 10053 and AFR 75-30 (5 Bull. JAG 98). *Prior to the enactment of the Federal Tort Claims Act certain claims for money losses were considered cognizable*

under the Act of July 3, 1943, when not payable under the Military Personnel Claims Act (par. 15), but since then such claims may be cognizable under either act, depending upon the factual situation involved. For example, a claim for money deposited at an Army hospital was presented by a soldier patient but since the amount involved exceeded the amount determined to be reasonable under the regulation, payment was made under the Act of July 3, 1943 (5 Bull. JAG 68).[20] Accordingly, there is a marked distinction between the items of property for which payment may be made under AFR 112-3, AFR 112-4 and AFR 112-7, inasmuch as the Military Personnel Claims Act and AFR 112-7 limits the type and kind of property claims that may be presented thereunder (par. 3, AFR 112-7), whereas no such restrictions are now contained in either of the other acts (par. 15, AFR 112-3; par. 15, AFR 112-4)." Op. JAGAF 1952/18, 11/19/51, 1 *Dig. Ops.*,[21] Sec. 95.7 (Claims), p. 71.

The following opinions all involve property damage claims which were incident to service under the Military Personnel Claims Act of 1945[22] [See Footnote 6, Opinion of District Judge, Tr. 33], where the Judge Advocate General of the Air Force ruled that, if negligence existed, the claims were cognizable under the Tort Claims Act:

"Para. 286. Bailment—trailer left in parking lot at military base. Wheels and tires were stolen from

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[20]Cited in this Brief, *supra.*

[21]1 *Dig. Ops.* refers to Volume 1 of the Digest of Opinions of the Judge Advocates General of the Armed Forces recently published.

[22]The 1945 Act did not change the meaning of "incident to service" as used in the prior Military Personnel Claims Acts. It merely broadened the type of such claims that would be paid.

the claimant's automobile trailer, which was parked at his convenience in an approved parking lot at a Texas Air Force base. *No* bailment to the government was shown or *proof of negligent, wilful or wrongful acts of government agents.* Accordingly, the claim was properly disapproved. (Citing AFR 112-3; AFR 112-4 (Tort Claims Act); AFR 112-7; (cits.).)" Op. JAGAF 1950/69, 1 June 1950, 2 *Dig. JAGAF* 6.[23]

"Sec. 95.5. Motor vehicles.

The claimant was assigned government quarters in a building on an air base and was authorized to park his car in a basement garage below. A fire of 'unknown' origin broke out in the basement of this building. As a result, the claimant's automobile was destroyed to such an extent that it would have to be sold for salvage and a set of golf clubs and a golf bag stored in the car were damaged to such an extent that they were of no further use to the claimant. In addition, clothing located in the claimant's quarters above the garage were damaged by smoke, necessitating dry cleaning. HELD: The claim for the loss of the automobile and golf equipment is cognizable but not payable under AFR 112-3 and the Act of July 3, 1943 (57 Stat. 372; 31 U. S. C. 223b), for the reason that the property was not bailed to the government at the time of the loss. While claimant was permitted to park his car in the garage, it was for his own convenience and at his own risk, except for loss or damage caused by the negligent or wrongful act or omission of employees of the Government while acting within the scope of their employment (38 Am. Jur. 767). *But no evidence of*

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[23]Reference is to Digest of the Judge Advocate General of the Air Force.

tort liability was adduced (28 U. S. C. 2672 (Tort Claims Act)) and such a loss was not incident to 'noncombat activities' within the meaning of AFR 112-3, par. 4e (7 Bull. JAG 193). Moreover, that part of the claim covering the automobile and the golf equipment which was in the automobile at the time of the fire, is not payable under the Military Personnel Claims Act of 1945 (31 U. S. C. 222c) and AFR 112-7, as the property was not destroyed 'at quarters' or while in government 'custody' (par. 3b(1), AFR 112-7). Furthermore, claims for motor vehicles are ordinarily not paid under such Act and claimant's loss does not fall within the exception provided (par. 3b(4) and 4g, AFR 112-7). However, that part of the claim for the cost of dry cleaning of claimant's clothing is approved, in accordance with the provisions of the Military Personnel Claims Act of 1945 and AFR 112-7, par. 3b(1), even though the cost for such dry cleaning is not substantiated by a receipted bill, as the claim appears credible." Op. JAGAF 1951/100, 26 July 1951, 1 *Dig. Ops.,* Sec. 95.5, p. 70 (Claims).

"Sec. 93.9. Fire, flood, or other serious occurrence.

The claimant occupied assigned quarters at an Air Force Base in the Canal Zone. The wooden wall cabinet in the kitchen of his quarters suddenly fell away from the wall, thereby breaking the china and glassware stored in the cabinet, as well as articles on the drainboard beneath the cabinet. The facts showed that the cabinet had been anchored to the wall with four nails near its base when installed several years before; however, inspections during use had not revealed any defects. Moreover, the overloading of the cabinet appears to have been a contributing factor in the accident. *Held:* Claim for

the loss of personal property is disapproved because the property was not damaged or destroyed by 'fire, flood, hurricane or other serious occurrence' while located in assigned quarters (par. 3b(1), AFR 112-7, 15 February 1950). In this connection, the occurrence that caused the damage is not the type of incident that is considered to be a serious occurrence because it has been construed to mean an occurrence similar in character to those specifically mentioned, *i.e.,* typhoon, cloudburst, earthquake, explosion, etc. (7 Bull. JAG 89). Furthermore, although the Military Personnel Claims Act of 1945, as amended, and AFR 112-7, no longer limits recovery to *rigid categories* of claims enumerated therein, and any claim falling within the general statutory provisions thereof, not specifically excluded by statute or regulation, may be submitted for consideration and in proper cases approved for payment, *this claim does not appear to be the type of 'meritorious' claim that falls within the spirit of the statute* (par. 3a, AFR 112-7), *because recovery is predicated solely on the negligent or wrongful act or omission of government employees. Accordingly, in the continental United States and its territorial possessions, including the Canal Zone, the Federal Tort Claims Act and AFR 112-4 are preemptive in such circumstances (28 U. S. C. 2671-80).* However, in either event, the overloading of the cabinet would constitute negligence and thus preclude payment of the claim (par. 7, AFR 112-4 and par. 4L, AFR 112-7)." Op. JAGAF 1952/83, 12 September 1949, 2 *Dig. Ops.* No. 1, Sec. 93.9, p. 26 (Claims).

And the Army, Air Force and Navy Regulations[24] with respect to the Tort Claims Act, the Military Claims Act and the Military Personnel Claims Act clearly indicate that claims of military and civilian personnel for property damage losses incident to their service are cognizable under all three Acts.

For example, the Army[25] Regulations on claims (32 C. F. R. 536.1-29) contain the following pertinent provisions:

> "Sec. 536.17. *Claims of or pertaining to military personnel or civilian employees—(a) Property claims —(1) Statutes and regulations.* Claims for damage to or loss or destruction of personal property of military personnel or civilian employees of the Department of the Army *occurring incident to their service* will be considered first under the provisions of Sec. 536.27 which, if applicable, take precedence over the provisions of Secs. 536.12 to 536.23. *Such claims* found not to be payable under the provisions

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[24]We do not have access to sets of the Regulations of the three services; however, they are published in the Code of Federal Register, Title 32. In that Title, the Army Regulations (AR) are in Part 536, Air Force (AFR) in Part 836, and Navy (NR) in parts 750 and 751. The cross references (between the Regulations and the Register) with respect to the three Acts we are concerned with are as follows:

Act	AR (32 C.F.R.)	AFR (32 C.F.R.)	NR (32 C.F.R.)
F.T.C.A.	25-70 (536.29)	112-4 (836.10-25)	? (750.1-16)
M.C.A.	25-25 (536.12-23)	112-3 (836.30-44)	? (750.17-25)
M.P.C.A.	25-100 (536.27)	112-7 (836.90-108)	? (751.1-32)

[25]It is apparent that the Regulations of any of the three services are equally pertinent, since all are issued under authority of the President, and it may not be questioned that the claim rights of all military personnel are identical, regardless of the particular service to which they are assigned.

of Sec. 536.27 and claims for damage to or loss or destruction of personal property of all other persons, estates, public or private corporations, firms, partnerships, or other claimants may be payable under the provisions of Secs. 536.12 to 536.23, *except those cognizable under the Federal Tort Claims Act* as codified in the act of June 25, 1948 (62 Stat. 983; 28 U. S. C. 2672).

* * * * * * * *

Sec. 536.27. (c) *Claims not payable.* Claims otherwise within the scope of paragraph (b) of this section are nevertheless not payable under the provisions of this section (*but see* Secs. 536.12 to 536.23, 536.25, 536.26 and *536.29*) when the damage, loss, destruction, capture, or abandonment incident to the service involves any of the following:

* * * * * * * *

10. Losses recoverable from insurer. Losses, or any portion thereof, which have been recovered or are recoverable from an insurer.

* * * * * * * *

Sec. 536.29(1).

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(12) Claims for personal injury or death of military personnel or civilian employees incident to their service are not payable under the provisions of this section. However, if otherwise allowable, claims for injury or death of such personnel not incident to their service are payable under these provisions."

For substantially similar Regulations as to the Air Force see 32 C. F. R. 836.25, 836.30, 836.33, 836.44, 836.103, and as to the Navy see 32 C. F. R. 751.18.

(c) The Authorities Support the Foregoing Construction of the Tort Claims Act.

In *Samson v. United States, supra* (S. D., N. Y.), 79 Fed. Supp. 406, a soldier stationed at Fort Dix, while off duty, boarded an Army bus on the Post, and was injured (on the Post) as a result of the negligence of the driver. The Court held he was entitled to sue under the Tort Claims Act.[26] In deciding that the suit was cognizable under that Act, the Court noted that prior to that Act, this claim would have been cognizable under the Military Claims Act of 1943, although it was a personal injury claim, since it did not arise incident to the soldier's service; and since the Tort Claims Act took over negligence claims that had theretofore been cognizable under the Military Claims Act, it must have taken over this claim. Said the Court:

> *"Section 424(a) of the Federal Tort Claims Act repealed prior miscellaneous methods of disposing of claims for personal injuries or death caused by the negligence of an employee of the United States while acting within the scope of his office or employment and specifically repealed among other acts, the Military (Personnel) Claims Act of July 3, 1943,* (cit.). *The Federal Tort Claims Act must therefore be construed in the light of the law which it supplanted.* (Cits.) * * *
>
> It is evident that since Congress (in the Military Claims Act) specifically excluded military personnel whose claims were based on personal injury or death which occurred incident to their (the claimant's)

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[26]Since the soldier was off duty, the decision is in accord with the rule announced by the *Feres* and *Brooks* cases, *supra.* It is cited with approval in footnote 2 of an annotation on the general subject here involved following the *Feres* case at 95 L. Ed. 161.

service, *it must be that Congress considered military personnel whose claims were not incident to service and intended such claimants to be within the general coverage of the Act.*

It is settled that that which is implied or is within the intention of the law-makers is as much a part of the statute as that which is expressed (cits.).

The Military Claims Act provided for claims by military personnel arising from injury or death sustained otherwise than as an incident to their services. These claims could be settled if claimant agreed to accept the prevailing limited amount. If the claimant, *whether a member of the military forces or a civilian,* had a claim exceeding the amount which the Secretary of War could settle, then the Secretary of War could report it to Congress so that Congress might take appropriate action in respect to a private claim bill. (Cit.)

Thus prior to the enactment of the Federal Tort Claims Act redress for the injury or death of a member of the military forces, as well as that of a civilian, might be had by means of a private bill if the injury or death had not been sustained as an incident to the injured or deceased person's services as military personnel or as civilian employees of the War Department or of the Army.

The Federal Tort Claims Act continued the authority of heads of Federal agencies to settle claims up to the amount of $1,000. But it added a new right, namely—where the tort claim exceeded that limit, the claimant might bring suit against the United States on a claim arising out of the negligent act of a Government employee while acting within the scope of their office or employment, under circumstances where the United States, if a private

person would be liable, and where, until the passage of this Act, the claimant would have had to resort to a private claim bill of Congress. * * *

The Senate Committee in its report said—'This title waives with certain limitations governmental immunity to suit in tort and permits suits on tort claims to be brought against the United States. It is complementary to the provision in Title I banning private bills and resolutions in Congress, leaving claimants to their remedy under this Title.' (Cit.)

When Congress repealed the Military Claims Act it is evident that Congress intended that a claimant who was eligible to seek redress by way of a private claim bill now might sue under the Federal Tort Claims Act if claimant fulfilled the other conditions. * * *."

And since the claims here sued upon were expressly cognizable under the Military Claims Act (administratively if not over $1,000, and by Congressional bill if over $1,000) prior to enactment of the Tort Claims Act, such claims became cognizable under the Tort Claims Act upon the enactment of that statute.

Likewise pertinent is the decision of this Court in *Employers' Fire Ins. Co. v. United States* (C. A. 9), 167 F. 2d 655, which was the first appellate decision holding subrogated claims to be cognizable under the Tort Claims Act. In so holding, this Court attached importance to the fact that subrogated claims had been allowed under the Small Tort Claims Act of 1922, which, as we have seen, was one of the Acts replaced by the Tort Claims Act:

"The narrow construction urged by the Government finds no basis in the legislative history of the

Federal Tort Claims Act nor in a comparison with analogous federal legislation. Prior to the enactment of the Federal Tort Claims Act, certain categories of claims, not in excess of $1,000, were disposed of administratively by virtue of the Small Tort Claims Act. Claims in excess of $1,000 were presented directly to Congress. The Small Tort Claims Act provided that the head of each department could determine any claim 'on account of damage to or loss of privately owned property where the amount of the claim does not exceed $1,000.' In connection with this language, the problem arose as to whether subrogated claims were included, and the Attorney General, on June 29, 1932, rendered an opinion that claims of subrogees were covered by the statute. (36 Op. Atty. Gen. 553.) This interpretation of language nearly identical to that employed in the Federal Tort Claims Act was consistently followed by Congress in appropriating sums for the payment of subrogated claims thus certified; * * *. *It does not seem reasonable to suppose Congress intended to transfer the power of determining original claims to the Federal Courts and to retain for itself the determination of claims of subrogees.* * * *"[27]

And so in the instant case, "it does not seem reasonable to suppose" Congress intended to transfer the power of determining all negligence claims cognizable under the Military Claims Act of 1943, except service connected property damage claims of military personnel, to the Federal Courts, and to leave only such latter claims still to

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[27]When this same question later came before the Supreme Court in *United States v. Aetna Cas. & Surety Co.,* 338 U. S. 366, 70 S. Ct. 207, 94 L. Ed. 171, that court used similar reasoning and reached the same conclusion (p. 183 of 94 L. Ed.).

be determined under the Military Claims Act, administratively if not over $1,000.00 and by Congressional bill if over $1,000.00.

(d) The Construction Urged by Appellants Is Consistent With the Feres Case.

The *Feres* case dealt with service connected personal injury claims, whereas here we are dealing with property damage claims. In all the history of the various Federal claims statutes, no provision was made for payment of service connected personal injury claims; the reason no doubt being, as noted in the *Feres* case,[28] that Congress had provided "systems of simple, certain and uniform compensation for injuries or death of those in armed services." The Gunfire Act of 1912 and the Small Tort Claims Act only covered property damage claims. As we have seen service connected property damage claims were held to be cognizable under both of those Acts. While the Military Claims Act of 1943 covered both personal injury and property damage claims, it specifically excluded service connected personal injury claims. On the other hand, it specifically included (since 1945) service connected property damage claims. So for the past 40 years (except for the 1943-5 period) there has been a consistent Congressional policy of recognizing service connected property damage claims under the general claims acts applicable to civilians generally, and of excluding service connected personal injury claims therefrom.

In the *Feres* case, the Supreme Court specifically pointed out the above situation with respect to non-recog-

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[28]This phase of the problem and the *Feres* case will be further discussed under Point II, *infra.*

nition of service connected personal injury claims as one of the grounds of its decision (pp. 159-160 of 95 L. Ed.):

> "No federal law recognizes a recovery such as claimants seek. The Military (Personnel) Claims Act, 31 USCA, Sec. 223(b), FCA, title 31, Sec. 223(b) (now superseded by 28 U. S. C. A., Sec. 2672), permitted recovery in some circumstances, *but it specifically excluded claims of military personnel 'incident to their service.'* "[29]

It seems proper to comment with respect to the foregoing that where the converse is true, and for many years "federal law recognize(d) a recovery such as claimants seek," such recognition is strong evidence of a Congressional intent to continue to recognize such claims after the passage of the Tort Claims Act; especially where the very statutes that recognized such right of recovery were superseded (*pro tanto*) by the Tort Claims Act.

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[29]The reference to the Military Personnel Claims Act was no doubt inadvertent, as the citation is to the Military Claims Act, which is obviously what the court is referring to. Likewise, the statement that the latter act was superseded by the Tort Claims Act was not entirely accurate, since the repeal was only partial (as to negligence claims). This was specifically noted by the Judge Advocate General of the Air Force in commenting on this portion of the *Feres* case (2 Dig. JAGAF 3). Likewise, the reference by the Court to claims excluded under the Military Claims Act must be deemed to be to personal injury claims, with which the Court was concerned, and not to property damage claims.

II.

It Is Contrary to the Intent of Congress and the Rule of the Feres Case to Hold That Claimants Whose Claims Are Excluded From the Military Personnel Claims Act Are Without a Remedy.

We have heretofore pointed out (Point I, *supra*) that it was the intent of Congress that service connected property damage losses of military personnel caused by negligence of the Government be cognizable under the Tort Claims Act, regardless of whether they may also be covered by the Military Personnel Claims Act. However, the District Judge not only reached a contrary conclusion, but went further and held that such claims were not cognizable under the Tort Claims Act even though they were excluded from coverage under the Military Personnel Claims Act, thus leaving the claimants without any remedy.

(a) The Claims Here Sued Upon Were Excluded From the Coverage of the Military Personnel Claims Act Because of the Insurance Exclusion and the "Quarters" Exclusion.

These claims were not payable under the Military Personnel Claims Act because of the express exclusion contained in Air Force Regulations, Title 32, C. F. R., Sec. 836.93, entitled "Claims not payable":

> "Claims otherwise within the scope of Sec. 836.92 are nevertheless not payable * * * when the damage * * * incident to service involves any of the following:
>
> * * * * * * * *
>
> "(j) Losses recoverable from insurer or carrier. Losses or any portion thereof, which have been

recovered or are recoverable from an insurer or a carrier."

The reason for this exclusion no doubt is that the Act is an act of grace, and not predicated upon fault on the part of the Government; hence there is no basis for allowance of subrogated claims, or for paying the soldier where he has insurance. To this effect, see:

Op. JAGAF 1950/91, 9/18/50, 2 *Dig. JAGAF* 8, Sec. 384.

Conversely, it is settled that subrogated claims based on negligence of the Government are cognizable under the Tort Claims Act[30]

Employers' Fire Ins. Co. v. United States, supra, (C. A. 9), 167 F. 2d 655;

United States v. Aetna Cas. & Surety Co., supra, 338 U. S. 366, 70 S. Ct. 207, 94 L. Ed. 171.

These claims were likewise excluded from the coverage of the Military Personnel Claims Act by virtue of the exclusion *in the Act itself*[31] of losses occurring "at quarters occupied by the claimant * * * which are not assigned to him or otherwise provided in kind by the Government * * *."

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[30]Subrogated claims were also cognizable under the Small Tort Claims Act (see *Employers' Fire Ins. Co. v. United States, supra* (C. A. 9), 167 F. 2d 655); and under the Military Claims Act (see Title 32, C. F. R., Secs. 536.22, 836.41).

[31]Since this exclusion is in the Act itself, it could not be modified by the Regulations (which in any event do not purport to modify it), nor by any administrative action of the Air Force in allowing certain uninsured claims of the service personnel here involved.

The point in question would appear to be entirely settled by the Stipulation of Facts which provided in this regard [Tr. 15]:

> "That the military personnel living in the Trailer Park * * * were entitled to and drew the same quarters' allowances for quarters from the Government under the laws and regulations[32] prescribing the same *in lieu of* allowances as military personnel *living off the base, or the furnishing of government-owned quarters* to military personnel and their dependents by the government."

In addition, the personnel were required to pay rent to the Government for the space occupied [Tr. 16].

Nevertheless, the District Judge held [Tr. 36] that the *piece of ground* assigned for the parking of the trailer constituted "assigned quarters" within the Act. It is submitted that such construction of the words "assigned quarters" is untenable.

Webster's New International Dictionary, 2d Ed., Unabridged, defines "quarter" (noun) as:

> "9. * * * (b) Place of *lodging* or temporary residence; *shelter*—usually in pl.; as, the army was in winter quarters * * *."

And "quarter" (verb) is defined as:

> "2. To *shelter* * * *; esp., to assign to a certain place of *shelter,* as soldiers * * *."

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[32]The Pay Readjustment Act of 1942 (56 Stat. 359) provided: "Sec. 10. To each enlisted man *not furnished quarters* or rations, there shall be granted, under such regulations as the President may prescribe, an allowance for quarters and subsistence."

And by Executive Order 9206, 7 Fed. Reg. 5851, the President prescribed such allowances to, "enlisted men of the Army * * * *who are not furnished quarters* * * * *in kind* * * *."

And *State v. French* (N. Mex.), 99 P. 2d 715, 722, defined "quarters" as follows:

> "What is the meaning of the term 'quartering' of troops? 'Quarter' in a military sense has become the usual term applied to stations, buildings, lodgings, etc., in the regular occupation of military troops * * *."

It is submitted that the "quarters" of the personnel involved here were their house trailers, which belonged to them and hence were not "assigned" by the Government. Under no circumstances could the ground upon which the trailer was parked, and for which a rental was charged, be regarded as "quarters" or "assigned quarters" within the meaning of the Act. The losses to the trailers were therefore excluded from coverage by the express terms of the Act, regardless of whether they were insured.

In connection with these two exclusions, it is important to bear in mind that these are but two of a great many exclusions and restrictions in the Act and the Regulations thereunder. As we have noted above, the Regulations also exclude or restrict recovery for money, jewelry, motor vehicles, expensive articles, unnecessary property, transportation and baggage losses, etc. (32 C. F. R. 836.92-836.95).

It is submitted that there is not the slightest difference, legally, as to any of these exclusions and restrictions, including the insurance exclusion, in determining whether a claim that is excluded or restricted under the Military Personnel Claims Act, is cognizable under the Tort Claims Act. The District Judge purported to limit his decision to the insurance exclusion and stated it was "unnecessary" to decide what the result would be if a

soldier were personally bringing the suit and one of the other exclusions or restrictions were applicable [Tr. 29, 36]. And yet, the very fact that the District Judge found it necessary to discuss the "quarters" exclusion and find it inapplicable is a strong indication that the scope of the decision cannot be confined to the insurance exclusion; else what difference would it have made to the decision whether the "quarters" exclusion (or any other exclusion[33]) was applicable or inapplicable, since the insurance exclusion was unquestionably applicable.

Congress could not have intended that of all the claims incident to service that are excluded or restricted under the Military Personnel Claims Act, only insurance companies would be without a remedy for negligently caused damage under the Tort Claims Act, and that such remedy would be permitted with respect to all other excluded and restricted claims. Such construction is without reason or basis and contrary to the general recognition of subrogated claims under the Tort Claims Act where the Government has been negligent. While the District Judge attempted to restrict his ruling to insurers and leave undecided the general question of the rights of service personnel under the Tort Claims Act where their claims are excluded or restricted under the Military Personnel Claims Act, it is submitted that if this decision is permitted to stand, it must apply equally to the millions of military and civilian personnel of the Defense Department, and result in greatly restricting their claim rights. That this is so follows from the very

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[33]As noted above it is not possible to determine, as the District Judge did, that these claims, if uninsured, would have been paid in whole or in part, because of the motor vehicle, expensive article, discretionary amount of allowance exclusions and restrictions.

premise upon which the District Judge based his decision that these insurance claims here sued on are not cognizable under the Tort Claims Act, viz., that "* * * property losses of *military personnel* incident to their service *are compensable exclusively* under the Military Personnel Claims Act * * *" [Tr. 29]; and that said Act is the *"single" remedy of military personnel* for property damage losses incident to service [Tr. 26, 29]. If this premise is correct, it must bar all such claims under the Tort Claims Act, be they of service personnel or subrogated insurers; but if it is incorrect (and we believe we have shown that it is), then such personnel would have the right to sue under the Tort Claims Act and so would their subrogated insurers. Since subrogated claims are cognizable under the Tort Claims Act, it is immaterial that such claims may be excluded under the Military Personnel Claims Act Regulations, since here the claims are brought on the basis of negligence under the Tort Claims Act, and not under the Military Personnel Claims Act.

(b) The Reason for the Rule of the Feres Case Is Inapplicable to Service Connected Property Damage Claims.

In the *Feres* case, one of the basic reasons stated by the Court for its decision was (p. 160 of 95 L. Ed.):

> "This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. * * *
>
> "* * * The compensation system, which normally requires no litigation, is not negligible or niggardly * * *. The recoveries compare ex-

> tremely favorably with those provided by most workmen's compensation statutes. In the Jefferson case, * * * plaintiff received $3,645.50 * * * and on estimated life expectancy * * * would prospectively received $31,947 in addition. * * *."

The important part of the foregoing is the comment that these compensation, medical and hospital benefits are "simple, *certain,* and *uniform.*" For example, Title 38, U. S. C. A., Section 471, providing for pensions for service connected death or disability states that "the United States *shall pay*" the benefits referred to; and the laws provide for a comprehensive system of adjudication and settlement of all such claims on a uniform basis with a right of appeal, so that as the Supreme Court noted the system "normally requires no litigation."

Such rights are not remotely comparable to benefits provided by the Military Personnel Claims Act, with its numerous exclusions and restrictions and discretion to reject or reduce any claim, and without right of appeal or suit. It is therefore not surprising that Congress has for many years permitted military personnel to assert rights for service connected property damage claims under the same statutes as are available to civilians generally, in addition to the limited relief afforded under the Military Personnel Claims Act.

The Supreme Court further noted in the *Feres* case that the Tort Claims Act "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole" (p. 157 of 95 L. Ed.). The construction here urged by appellants is entirely consistent with the thought expressed in the forego-

ing quotation. Prior to the Tort Claims Act, military personnel were included within the scope of the various claims statutes, no doubt because of the many restrictions that have always been (and still are) contained in the Military Personnel Claims Act. And when the Tort Claims Act removed negligence claims from those prior statutes and put them under the Tort Claims Act, it is entirely consistent to apply such rights to military personnel. Where the loss is incident to service and without fault on the part of the Government, they have the restricted benefits of the Military Personnel Claims Act; but where the loss is due to negligence, the reason for the restricted rights granted by the Military Personnel Claims Act disappears, and they are entitled to make claim under the Tort Claims Act.

Another basic distinction between personal injury and property damage claims (implicit in the *Feres* case and also noted in the *Brooks* case), and that justifies different treatment thereof, is the possibility of double compensation if two remedies are available for personal injury claims, since the damages are unliquidated. In the *Brooks* case, in order to meet this problem, the Supreme Court directed the lower court to give the Government credit for the compensation, etc., benefits in making its general damage award, so as to prevent a double payment. But in the case of property damage, the article can only have one value and if the soldier has been paid for it under the Military Personnel Claims Act, he cannot make a further claim for it under the Tort Claims Act, or vice versa.

Congress in enacting the Tort Claims Act did not indicate a desire or intent to discriminate against military personnel and leave them without any remedy where the Government *negligently* damaged their personal property. It is submitted that such a harsh and unnecessary result should not be reached, in the absence of a clear expression by Congress that it so intended.

(c) The Federal Tort Claims Act Is Generally Given a Broad and Liberal Construction and to Do so Here Will Arrive at a Proper Result.

"The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language. It unquestionably waives it in favor of an injured person. It does the same for an insurer whose claim has been subrogated to his. (cit.) * * *.

"This Act does not subject the Government to a previously unrecognized type of obligation. Through hundreds of private relief acts, each Congress for many years has recognized the Government's obligation to pay claims on account of damage to or loss of property or on account of personal injury or death caused by negligent or wrongful acts of employees of the Government. This Act merely substitutes the District Courts for Congress as the agency to determine the validity and amount of the claims. * * * Recognizing such a clearly defined breadth of purpose for the bill as a whole, and the general trend toward increasing the scope of the waiver by the United States of its sovereign im-

> munity from suit, it is inconsistent to whittle it down by refinements."
>
> *United States v. Yellow Cab Co.,* 340 U. S. 543, 71 S. Ct. 399, 95 L. Ed. 523.

And in footnote 5 of that case, the Supreme Court quoted the following from the opinion of this Court in *Employers' Fire Ins. Co. v. United States, supra* (C. A. 9), 167 F. 2d 655:

> "Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule (of strict construction) cannot be had in order to enlarge the exceptions."

In the words of the *Yellow Cab Co.* case, *supra,* to construe the Tort Claims Act to permit claims of military personnel for service connected property damage losses negligently caused to be asserted under that Act "does not subject the Government to a previously unrecognized type of obligation." On the contrary, as has been pointed out, such claims were within the scope of the Military Claims Act (both as to the administrative and Congressional bill provisions thereof) and its predecessor statutes, which were replaced (as to negligence claims) by the Tort Claims Act.

III.

The Damage to the Trailers Was Not Service Connected Within the Rule of the Feres Case.

(a) The Facts.

The stipulation recites that the Trailer Park was operated by the Government as a "convenience and accommodation" for the personnel and their families; they were not required to live there, and were free to live off the Base; they paid rental for the space; none of the personnel involved had any duties with respect to the plane that crashed; they were off duty and off the base at the time the crash occurred [Tr. 13-16].

(b) The District Judge's Ruling.

The District Judge concluded that the service-connected rule of the *Feres* case applied to property damage losses; that in determining whether the losses were service-connected in so far as the Tort Claims Act was concerned, the sole test was whether they were "incident to service" under the Military Personnel Claims Act; as he put it—

> "* * * the key to the proper application of the term 'incident to service' to property losses is the Military Personnel Claims Act of 1945. [Tr. 26.] * * * Since property losses of military personnel incident to their service are compensable exclusively under the Military Personnel Claims Act, that Act must be the guide in determining what losses are 'incident to service.'" [Tr. 29.]

And he concluded that in determining whether a loss was "incident to service" under the Military Personnel Claims Act, the following was the test:

> "* * * the term * * * was not employed in the statute in any restricted sense to require that a

> compensable loss occur during the performance of military duties or on a military base. The term was used in a general sense merely to indicate that the loss must bear some substantial relation to the claimant's military service." [Tr. 34.]

Based on the foregoing, the District Judge concluded that the trailer losses were "incident to service" under the Military Personnel Claims Act, and hence *ipso facto* not cognizable under the Tort Claims Act.

(c) The Rule of the Feres Case.

As heretofore noted, the *Feres* case was preceded by the *Brooks* case. In the latter case, a soldier while on furlough was injured by a negligently driven Army truck. In upholding the soldier's right to sue under the Tort Claims Act, the Supreme Court stated (p. 1204 of 93 L. Ed.):

> "But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired."

In the *Feres* case (actually 3 cases), the claims involved negligent injuries to soldiers while on active duty; *e. g.,* in one case a defective heating plant in an Army barracks in which the soldier was quartered caused a fire; and in the other two cases, Army surgeons negligently operated on the soldiers in Army hospitals.

In the *Feres* case, the Court expressly approved the *Brooks* case but distinguished it upon the following grounds (p. 161 of 95 L. Ed.):

> "The injury to Brooks did not *arise out of or in the course of military duty.* Brooks was on furlough

* * * under compulsion of no orders or duty and on no military mission. * * * Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders.

"We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen *where the injuries arise out of or are in the course of activity incident to service.*"

In *Herring v. United States* (Colo.), 98 Fed. Supp. 69, 70, the court discussed the *Feres* and *Brooks* cases and noted that the test to be applied *under the Tort Claims Act* as announced by those cases was as follows:

"The determining factor appears to be the status of the injured party. Thus, the first fact pointed out by Mr. Justice Jackson in the *Feres* case is that the injured * * * parties * * * *were soldiers on active duty.*

In *Brooks v. United States* (cit.), the United States Supreme Court allowed recovery to a soldier who received his injury while on furlough. If an injury which a soldier received during war time, while he was home on furlough (subject to military regulations and call at any time), does not arise out of and is not incidental to military service, * * *.

"This argument can be even further fortified by the fact that in the *Brooks* case, where recovery was permitted to a soldier, *the injury was caused by an United States Army truck.* This last factor, and the stress which the Supreme Court put on the distinction between a soldier on active duty and a soldier on furlough, *indicates that the source and circumstances of the injury are relatively unimportant in judicial determination whether the wrong arose out*

of or was incidental to military service. The Brooks case stands unimpeached and is as much the law of the land today as it was in 1949."

Nor is there any distinction made in applying the test of these cases as between whether the soldier was on *leave* or *furlough*. It was so held in *Brown v. United States* (S. D., W. Va.), 99 Fed. Supp. 685, 687, where a sailor, on a liberty pass, was killed while swimming in a pool on a navy base, and the right of his heirs to sue for wrongful death under the Tort Claims Act was upheld:

> "It will thus be seen that so far as the Federal Tort Claims Act is concerned the Supreme Court uses the words 'on furlough' and 'on leave' as synonymous. In both cases the soldier is not on active duty, is not under compulsion of any orders or duty and is not on any military mission. He is free to go and do as he wishes."

It has also been held that the service-connected personal injury test of the right to sue under the Tort Claims Act *does not depend on whether the injury occurs on or off a military base.*

For example, in *Samson v. United States, supra* (S. D., N. Y.), 79 Fed. Supp. 406, 409, the right of a soldier to sue under the Tort Claims Act was upheld where he was injured at Fort Dix, where he was stationed, while riding on a bus provided by the Army during his off duty hours. Said the court:

> *"In the case at bar the deceased did not receive his injury as an incident to his service. At the time of his accident he was merely a passenger in a bus operated by the War Department. The fact that he was wearing his army uniform did not exclude him from his right to sue."*

And see to the same effect, *Brown v. United States, supra,* 99 Fed. Supp. 685, where the sailor was killed while on a naval base.

(d) The Damage to These Trailers Did Not "Arise Out of or in the Course of Activity Incident to the Service" of the Personnel Concerned.

The foregoing cases all dealt with personal injury claims. Assuming for the sake of argument that the rule of the *Feres* case applies to property damage claims, should the test be any more stringent or restrictive than that applied to personal injury claims? It is submitted that reason and authority require a negative answer.

A factual situation similar to that here involved was considered in *Lund v. United States* (Mass.), 104 Fed. Supp. 756, where it appeared that a naval aviation officer on active duty, and going on an official flight, drove his private car to the air field and parked it in an authorized naval parking area. While so parked, and while the officer was on his flight, a navy plane negligently damaged the car. He sued to recover the damage to his car under the Tort Claims Act and was awarded a judgment. In so holding the court referred to the rules announced by the *Feres* and *Brooks* cases as to personal injury claims and then stated (pp. 757-758):

> "This case differs on its facts since we are here concerned with damage to the *personal property* of a member of the armed forces rather than with personal injury or death.
>
> The case is not without difficulty. It is clear, however, that the plaintiff had the right to and did select the means of transportation used by him to arrive at his duty station. He was required by the Navy to be at the Air Station on the critical date to

take a training flight, but the Government did not care whether he traveled there by street car, bus, or private vehicle. He chose to use his own automobile, which choice he made in furtherance of his own purposes. I conclude, therefore, that the use of the motor vehicle, and the act of parking it in a designated area were not 'incident to' his service, and that the *Feres* * * * decision, *supra,* does not bar recovery. The vehicle was not employed by him in the performance of his duties as a member of the Armed Forces, nor was it used by him during the time that he was engaged in performing those duties. The use of a privately-owned automobile does not 'arise out of the military service of the plaintiff.'

I conclude that the case is within the jurisdiction of this Court by virtue of the Federal Tort Claims Act, 28 U. S. C. A., Sec. 2671, *et seq.;* * * *."

It is submitted that the reasoning and conclusion in the *Lund* case are applicable to the instant case; in fact, if anything, the facts of the instant case present a stronger case for coverage under the Tort Claims Act. In the *Lund* case, the plaintiff was on active duty at the time of the accident and he had to get to the air field to make his flight, and the use of an automobile was a reasonable way to get there. But in the instant case, the stipulation permits the finding that the soldiers were off duty and off the Base on their own personal business at the time of the accident. To paraphrase the *Lund* case, "The Government did not care whether the soldiers lived in trailers or in houses, or on or off the Base." The choice to live in the trailers and to park them on the Base was "a choice which they made in furtherance of their own purposes."

The use of the trailers and the parking of them were not "incident to the service," and "the trailers were not employed by them in the performance of their duties, nor were they used by them while performing their duties."

The District Judge noted the decision in the *Lund* case, but refused to follow it for the sole reason that in that case "the court gave no consideration to the Military Personnel Claims Act" [Tr. 34]. There are several answers to this:

(1) As noted in Point I, *supra,* the Military Personnel Claims Act does not require a holding contra to the *Lund* case. Therefore, there was no occasion for the Court to consider that Act. In the *Lund* case, the Government apparently did not consider that Act pertinent or no doubt it would have called it to the attention of the Court, and it would then no doubt have been discussed in the opinion. It is also pertinent to note that the Government apparently did not consider the *Lund* decision to be incorrect as it took no appeal therefrom.

(2) The test of "incident to service" under the Military Personnel Claims Act is not the same as the service connected test of the *Feres* case with respect to the Tort Claims Act.[34]

(3) The decision in the *Lund* case is sound and should not be summarily disregarded.

The soundness of the conclusion reached in that case finds support in several opinions of the Judge Advocates General of the Army and Air Force.

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[34]This point will be discussed further hereinafter.

HELD NOT INCIDENT TO SERVICE.

Army officer parked his car in an authorized parking lot on the Post and it was damaged by an Army truck. Held, car damage not incident to service.

2 *Bull. JAG* 274-275.

A soldier, off duty, was driving his car on the Post when it was hit by an Army truck. Held, car damage not incident to service.

4 *Bull. JAG* 62.

Officer, on leave, on way back to his station obtained a ride in an Army plane which crashed and damaged his personal effects. Held, damage not incident to service.

3 *Bull. JAG* 426.

Civilian Army instructor used his own radio equipment while teaching. When not using it he stored it in a building on the Post, where it was damaged in a fire. Held, damage not incident to service since he was not using the equipment at the time of the fire and because he was not required by the Army to use the equipment in his work.

4 *Bull. JAG* 185.

Civilian employee of Air Force kept his gauge tachometer in a locker furnished by the Air Force, where it was burned in a fire. Held, damage not incident to service, as the use of lockers, although authorized, was for personal convenience of the user, and the Government exercised no control over the property contained therein.

1 *Dig. Ops.*, Claims, Sec. 93.1, p. 63.

Airman went swimming in Air Force pool and checked his watch in checkroom run by Air Force. He did not get it back. Held, loss not incident to service, because the soldier was using the facility for his convenience and pleasure while off duty.

2 *Dig. Ops.,* No. 3, Claims, Sec. 94.1, p. 15.

Air Force personnel sent clothes to Air Force laundry where it was lost. Held, loss not incident to service since the use of Air Force laundry by personnel is a privilege, which is granted as a matter of courtesy.

3 *Dig. JAGAF,* Claims, Sec. 21, p. 6;
1 *Dig. Ops.,* Claims, Sec. 94.3, p. 65;
1. *Dig. Ops.,* Claims, Sec. 94.3, pp. 68-69.

HELD INCIDENT TO SERVICE.

Army officer was driving his car *under orders* for a permanent change of station *which authorized travel by private conveyance,* when he was struck by an Army truck. Held, car damage incident to service.

3 *Bull. JAG* 521.

Army officer was traveling in his auto pursuant to *temporary duty orders* when hit by Army truck. Held, car damage incident to service.

4 *Bull. JAG* 287, *supra.*

The test announced by the *Feres* case is whether the injury "arises out of or in the course of military duty." A consideration of the foregoing cases and rulings justifies the conclusion that whether it be personal injury or property damage, it is not service connected if the soldier is *off duty* at the time of the injury or damage, *or* if he is merely making use, *for his own convenience,* of an

authorized Government facility *which he is not ordered to use, e.g.,* parking lot, storage locker, laundry, bus, swimming pool.

Applying the foregoing to the instant case, we have present the following factors which justify the conclusion these losses were not service connected: the plane crash had nothing whatever to do with the soldiers' service, and the only reason the trailers were involved was because of the fortuitous circumstance that they were physically present near the place where the plane crashed; *the use of the trailer park was a courtesy and privilege offered by the Government for the convenience of the personnel which they were not ordered or required to use in connection with their service; the soldiers were off duty and off the Base at the time of the crash.*

We need only consider the situation that would exist if the crash had occurred off the Base to confirm the foregoing. The soldiers were free to live off the Base, and let us suppose they had their trailers parked in a private trailer park a mile from the Base, and that the plane crashed at that point and damaged the trailers. It is submitted that under no tenable theory would the losses in that situation be service connected within the rule of the above cited cases and rulings. And yet, whether the loss occurred on or off the Base, the trailers would be serving the identical function. And, as we have seen, the fact that the losses occurred on the Base and that the soldiers were using a Government facility (*e.g.,* parking lot, locker, laundry, bus, swimming pool), here, a trailer park, at the time of the loss, does not make the losses service connected.

It is submitted that these losses did not "arise out of the service" within the meaning of the *Feres* case.

(e) The Military Personnel Claims Act Is Not the Test of Whether the Losses Were Service Connected.

The District Judge concluded that if these losses were incident to service within the Military Personnel Claims Act, they were *ipso facto* service connected under the rule of the *Feres* case. He apparently reached this conclusion because he had construed said Act to be the sole remedy of service personnel for such losss [Tr. 26, 29].

It is submitted that this is a *non sequitur,* especially since the premise upon which it is based is untenable. In passing the Military Personnel Claims Act, the Government was granting certain claim benefits to soldiers for losses for which the Government would not normally be liable, in the absence of such an Act. Liability was not conditioned upon a showing of fault. It may well be, as stated by the District Judge, that such an Act should be construed "liberally" [Tr. 33], and it is only necessary "that the loss must bear some substantial relation" to their service [Tr. 34], in order to come within the scope of the Act.

But the Tort Claims Act makes the Government liable only where it is negligent. Basically, it covers "any claim" of any person, subject to the restriction announced by the *Feres* case. In determining whether service personnel should be *deprived* of a right to make claim under that Act, entirely different considerations should govern than in determining whether a claim is *included* under the Military Personnel Claims Act. For example, in the *Brooks* case, *supra,* where a soldier was held entitled to sue under the Tort Claims Act where injured while on furlough, he had already been paid compensation benefits because his injuries were incurred "in line of duty" (38

U. S. C. A., Sec. 701), since a soldier injured on furlough is, for the purposes of the compensation, hospital and medical benefits statute, as much regarded injured "in line of duty" as one injured on active duty. So what may be deemed service connected for one purpose (compensation statutes), may not be service connected for another purpose (Tort Claims Act).

The Military Personnel Claims Act is far from a substitute for or analogous to the Tort Claims Act, and the statutory history of the two acts shows that Congress did not intend the Military Personnel Claims Act to be the sole remedy of service personnel for service connected property damage losses. Therefore, in determining whether a loss is service connected for purposes of the Tort Claims Act we should look at that Act, its legislative history and background, and the cases decided under it, and not be restricted or guided by whether a particular claim is incident to service under the Military Personnel Claims Act. The danger in doing the latter is well illustrated by the decision of the District Judge. Having determined that these losses were incident to service under the Military Personnel Claims Act (but excluded from coverage thereunder), he leaves the claimants without any remedy. Had he looked at the issue squarely as one arising under the Tort Claims Act, at the history of that Act and the Acts it supplanted, and the cases considering the issue under that Act, it is submitted that the conclusion would have been that these losses were not service connected, and that they were cognizable under the Tort Claims Act.

(f) There Is No Issue of Estoppel Available to the Government.

In the District Court the Government urged that appellants were estopped to deny that these losses were "incident to service," because the owners of the trailers had made claim under the Military Personnel Claims Act for certain uninsured losses and certain payments were made on such claims by the Government. The District Judge found it unnecessary to rule on this issue [Tr. 25-26].

Assuming the point is available to appellee on this appeal, it has no merit for the following reasons:

(1) The claim forms and approvals by the Government affirmatively show that the Government was fully apprised therein of all of the circumstances surrounding the losses, and that the insurers had already paid the trailer losses and were then the owners of all claims for damage thereto [Tr. 18-20].

Since the Government itself knew all the facts and necessarily made its own decision as to whether the claims were "incident to service," the basic elements of an estoppel are lacking. In any event, since the soldiers did not own the claims for the trailer damage at the time they filed their uninsured claims, the acts of the soldiers in filing such claims could not estop the insurers, who did not participate therein. For example, where a tort-feasor settles with an injured party and takes a full release with knowledge that an insurer has been subrogated to all or part of the claim, the release is not effective to bar the subrogation claim.

Mitchell v. Holmes, 9 Cal. App. 2d 461, 50 P. 2d 473;

29 *Am. Jur.* 1005-1006, Sec. 1344;

54 *A. L. R.* 1455;
105 *A. L. R.* 1433.

(2) The Air Force Regulations required the soldiers' claims to be filed first under the Military Personnel Claims Act, and then the Air Force was to determine whether the claims would be paid under that Act or one of the other claim statutes, *e.g.,* the Tort Claims Act (32 C. F. R., Sec. 836.103). In view of this requirement, no estoppel can be predicated in favor of the Government.

(3) A claim or finding of "incident to service" under the Military Personnel Claims Act is not a claim or finding that the claim is service connected under the Tort Claims Act.

(4) The Military Personnel Claims Act excludes claims that are recoverable from insurers, but such claims are cognizable under the Tort Claims Act. To permit the Government to administratively make a finding of "incident to service" without even giving notice or a hearing to appellants, and then to assert that such finding is binding upon them and operates to deprive them of their day in court, would be in violation of the most elemental concept of due process.

It is submitted that the judgment of dismissal should be reversed and the case tried on its merits.

Respectfully submitted,

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